* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: January 17,2006

1. W.P.(C) 22726/2005

M.R. TOBACCO PVT. LTD ..... Petitioner

versus

UNION OF INDIA & ORS ..... Respondents

2. W.P.(C) 22758/2005

M.R. TOBACCO PVT. LTD ..... Petitioner

versus

UNION OF INDIA & ORS ..... Respondents

Advocates, who appeared in these cases:

For the Petitioners : Mr. Ramakant Gaur with Mr.Anujay Tiwari, Advocates.

For the respondents : Mr. S.K. Misra, Sr. Adv. with Mr.Rajesh Mahna, Mr.Zafar Sadique, Mr.Rahul Singh Chauhan, Advocates.

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether reporters of local papers may be allowed to see the judgment?

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2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

: **T.S. THAKUR, J.**

In these petitions, seeking a writ of *certiorari,* the petitioners have called in question the constitutional validity of notification dated 31st March, 2000, issued by the Lt.Governor of NCT of Delhi, under Section 71 of the Delhi Sales Tax Act, 1975 (for short "the Act") to the extent it has introduced *Gutka* as one of the items in Schedule-I to the Act retrospectively with effect from 1st April, 2000. The petitioners have also assailed the correctness of re-assessment orders made by the Assessing Authority for the periods 2000-2001 & 2001-2002 and the demands raised on the basis thereof.

2. The petitioners are engaged in the manufacture of *Gutka, Pan Masala* and chewing tobacco and are registered as dealers under the State & Central Sales Tax enactments. Assessments for the years 2000-2001 & 2001-2002 were reopened in terms of notices dated 16th August, 2005, culminating in re-assessment orders under the State Act as also the Central Act and raising of consequent demands for payment of taxes under the two enactments. Aggrieved, the petitioners have assailed the said orders of re-assessment apart from

challenging the *vires* of notification dated 31st March, 2000, whereby *Pan Masala* and *Gutka* were included as goods chargeable to tax under section 4(1)(a) of the Act.

3. We have heard learned counsel for the parties and perused the record.

4. Appearing for the petitioners, Mr.Gaur made a two-fold submission in support of the challenge mounted in the petition. Firstly, it was contented on the authority of the judgment of the Supreme Court in *Kothari Products Ltd. Vs. Govt. of A.P.*, **(2000) 9 SCC 263** that since G*utka* and tobacco are covered under The Additional Duties of Excise (Goods of Special Importance) Act, 1957, the same were exempt from payment of any sales tax. Secondly, it was argued that additional excise duty payable under The Additional Duties of Excise (Goods of Special Importance) Act, 1957 being in lieu of sales tax, the levy of sales tax by the inclusion of *Gutka* in Schedule-I of the Act was unconstitutional in as much as the same was contrary to the spirit underlying in The Constitution (Eightieth Amendment) Act, 1999 apart from exposing the petitioner to double taxation which was legally impermissible.

5. Mr. Misra, counsel appearing for the respondents, on the other hand, argued that challenge to the impugned

notification inserting *Pan Masala* and *Gutka* as Entry No.46 in the First Schedule to the Act had been examined and repelled by a Division Bench of this Court in *Shanti Fragrances Vs. Union of India & Ors.*, **[W.P.(C). No.11251/2004]**, disposed of on 5th November, 2004. He urged that a Bench of coordinate jurisdiction having upheld the notification, this Court was bound by the said decision, in the light whereof the first limb of the petitioner's challenge did not really arise for consideration. In so far as the alternative submission was concerned, it was argued by Mr.Misra that neither The Constitution (Eightieth Amendment) Act, 1999 nor The Additional Duties of Excise (Goods of Special Importance) Act, 1957 created any embargo for the competent State Legislature to levy a tax on the sale of even such goods as were otherwise covered by the provisions of earlier mentioned Act. He submitted that the source of power to levy additional excise duty was distinctly different from that under which the State Legislatures were competent to levy tax on the sale of goods. The Act, argued the learned counsel, gave to the Lt. Governor the power to grant or withdraw exemption by a suitable insertion or deletion of any Entry from the Schedule to the Act. In as much as the competent authority had withdrawn the exemption earlier enjoyed by *Gutka,* by

including the same in Schedule-I of the Act, it committed no constitutional impropriety leave alone any illegality to warrant interference by a writ court.

6. In Shanti Fragrances's case (supra), this Court was examining the constitutional validity of the impugned notification. Reliance was placed by the petitioners upon the decision of the Apex Court in Kothari Product's case in support of its contention that since tobacco included *Gutka,* the same was exempt from the payment of sales tax. This Court, however, repelled that contention. Relying upon the decisions of the Supreme Court in Commissioner of Sales Tax, U.P. Vs. Agra Belting Works, **(1987) 66 STC 1;** Sales Tax Officer, Sector IX, Kanpur Vs. Darling Dairy Products and another, **(1994) 94 STC 93**; State of Bihar and another Vs. Krishna Kumar Kabra and another, **(1998) 108 STC 1** and Reliance Trading Company Vs. State of Kerala, **(2000) 119 STC 321** this Court held that it is open to the State to withdraw a general exemption by inclusion of entry in the Schedule enumerating goods the sale whereof would attract a tax. The ratio of the decision rendered by the Supreme Court in Kothari Product's was distinguished, keeping in view the provisions of the Delhi Sales Tax Act. Sitting in a coordinate jurisdiction, the said decision is binding on us,

especially when the ground urged before us is the same as has already been examined and repelled, by this Court. Even otherwise, the argument advanced before us on behalf of the petitioners rests entirely on the decision of the Supreme Court in Kothari Product's case, in which case the petitioner had challenged introduction of Entry-194 in the First Schedule to Andhra Pradesh General Sales Tax Act, 1957. That Entry sought to tax P*an Masala* including *Gutka.* The contention advanced before the Supreme Court was that the State of Andhra Pradesh was not competent to tax *Gutka.* Interpreting the provisions of Section 8 of the Andhra Pradesh General Sales Tax Act, 1957, the Schedules attached to the same and the provisions of The Additional Duties of Excise (Goods of Special Importance) Act, 1957, which refer to *Gutka* under the sub-heading "Other manufactured tobacco", the Court held:

> **"Clearly, therefore, gutka is a tobacco that is covered by an entry in the First Schedule to the said Additional Duties of Excise Act and the branded gutka that the appellants manufacture is liable to tax thereunder. Gutka, therefore, is "goods" covered by the explanation to the Fourth Schedule to the State Sales Tax Act and, therefore, covered by the exemption contained in Section 8 thereof. The Schedule to the State Act could, therefore, not have been amended by including gutka as a kind of pan masala in Entry 194 of its First Schedule. It must, therefore, be held that the incusion of gutka**

in the said Entry 194 in the manner in which it is done is bad in law and is struck down. The appellants will be entitled to all consequential benefits."

7. The above makes it clear that insertion of Entry 194 was found to be impermissible because goods covered by the Explanation to the Fourth Schedule to the State Act were exempt under Section 8 from the payment of any tax on sales. That decision does not lend any assistance to the petitioners in the present case because Section 7 of the Act or Schedule-III referred to therein does not grant exemption to tobacco or *Gutka* depending on whether or not the goods in the Schedule are amenable to additional duties of excise under the provisions of The Additional Duties of Excise (Goods of Special Importance) Act, 1957. The Scheme of Section 8 of the Andhra Pradesh General Sales Tax Act and the Schedule to the same particularly in so far as exemption from payment of sales tax is concerned, is different from the Scheme underlying the provisions of Section 7 and Schedules referred to therein of the Delhi Sales Tax Act. We have in that view no difficulty in repelling the first limb of the challenge urged before us on behalf of the petitioners.

8. Coming then to the alternative submission urged before us, the same proceeds on the assumption that levy of an

additional excise duty under the provisions of The Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) does not leave any room for levying any sales tax on such of the goods as are exigible to such excise duty. The Statement of Objects and Reasons of Act 58 of 1957 runs thus:

> **"The object of the Bill is to impose additional duties of excise in replacement of the sales taxes levied by the Union and States on sugar, tobacco and millmade textiles and to distribute the net proceeds of these taxes, except the proceeds attributable to Union territories, to the States. The distribution of proceeds of the additional duties broadly follows the pattern recommended by the Second Finance Commission. Provision has been made that the States which levy a tax on the sale or purchase of these commodities after April 1, 1958 do not participate in the distribution of the net proceeds. Provision is also being made in the Bill for including these three goods in the category of goods declared to be of special importance in inter-state trade or commerce so that, following the imposition of uniform duties of excise on them, the rates of sales tax, if levied by any State are subject from April 1, 1958 to the restrictions in Section 15 of the Central Sales Tax Act, 1956."**

9. It is evident from the above that the object of the Act was to substitute additional duties of excise in place of sales tax in so far as the goods referred to in the Statement of Objects and Reasons were concerned. This did not, however, prevent the State Legislatures from levying taxes on the sale or purchase of the commodities which were exigible to additional excise duty.

That position was made clear by the Supreme Court in *M/s.Mahalakshmi Oil Mills Vs. State of Andhra Pradesh*, **(1989) 1 SCC 164**, where their Lordships have, after referring to the objects of the Act extracted above, observed:

> "In short, the object of the Act was to substitute additional duties of excise in place of sales tax so far as these goods were concerned. Since the State legislatures were at liberty, if they wished, to levy taxes on the sale or purchase of these commodities, the Act provided that the additional excise duties will be distributed only among such States as did not levy a tax on the sale or purchase of these commodities. Also, by including these goods in the category of goods declared to be of special importance in inter-State trade or commerce, the legislation ensured that, if any State levied sales tax in respect of these commodities, such levy was subject to the restrictions contained in the Central Sales Tax Act, 1956."

10. To the same effect is the decision of the Supreme Court in State of Kerela Vs. Attesse, **(1989) 72 STC 1**, where the Court observed:

> "By levying sales tax on an item covered by the Schedule to the 1957 Act, the State will have to forego its share on distribution of proceeds of the additional duty levied. Whether it should impose sales tax on an item of declared goods limited by the restrictions in section 15 of the Central Sales Tax Act, 1956 and at the risk of losing a share in the additional excise duty levied in respect of this very item is for the State to determine."

11. We also refer to State of Bihar Vs. Bihar Chamber of

Commerce, **(1996) 103 STC 1,** where the Supreme Court has authoritatively set the controversy at rest in the following words:

> "By enacting the Additional Duties of Excise (Goods of Special Importance) Act Parliament levies additional duties of excise and distributes a part of the proceeds among the States provided the States do not levy taxes on sale or purchase of the schedule commodities. Parliament has also provided the consequence that follows if any State levies tax on sale or purchase of schedule commodities; all that happens is that the State will be deprived of its share in the proceeds of additional duties of excise for that financial year. Even this is subject to the power of the Central Government to direct otherwise, and Parliament could not, and did not, prohibit any State from making any law levying any tax which a State can levy by virtue of the entries in List II."

12. In the face of the above, there is no gainsaying that the levy of additional excise duties in the category of goods declared to be of special importance in inter-State trade or commerce, did not prevent the State Legislatures from levying a sales tax in support of the very same commodities subject to the restrictions contained in the Central Act. All that the levy of any such sales tax would mean is that the additional excise duty levied on such commodities by the Central Government will not be distributed among such of the States as had levied such a sales tax. That, however, is a matter concerning distribution of the proceeds of additional duties, which does not affect the

legislative competence of the State Legislatures to levy a tax on the sale of such goods. There is nothing even in the Constitution (Eightieth Amendment) Act, 1999 to suggest that levy of additional excise duties on sale of tobacco, cotton or sugar would dis-entitle the competent State Legislatures to levy a tax on sales even when such legislatures are ready to forego their share of revenue collected towards additional excise duties.

13. Para 3 of the Statement of Objects and Reasons of The Constitution (Eightieth Amendment) Act, 1999 upon which the petitioners places heavy reliance reads thus:

> "In addition, three per cent share in the gross proceeds of all Central taxes and duties (excluding stamp duty, excise duty on medicinal/toilet preparations, Central Sales Tax, Consignment tax, cesses levied for specific purpose under any law made by Parliament and Surcharge) is to be assigned to the States in lieu of their existing share in Additional Excise Duties in lieu of Sales Tax on tobacco, cotton and sugar. The commission had proposed that tobacco, cotton and sugar may continue to be exempt from Sales Tax and the Additional Excise Duties in lieu of Sales Tax on these items may be merged with the Basic Excise Duties."

14. It is, in our view, difficult to see how the legislative competence of the States can be determined leave alone curtailed on the basis of the above paragraph appearing in the

Statement of Objects and Reasons. Given the history of the legislation levying additional excise duties and the interpretation placed upon the provisions of the Act by the Supreme Court in Mahalakshmi Oil Mills' case (supra),the words appearing in the Statement of Objects and Reasons cannot be read out of context or understood to mean as though The Constitution (Eightieth Amendment) Act, 1999 had taken away the power of the State Legislatures to levy a tax on the sale of the goods exigible to additional excise duties. When understood in proper context, levy of additional excise duties in lieu of sales tax on tobacco, cotton and sugar may be an expression relevant only in cases the States have not levied any sales tax on the sale of such goods, for in that event the States concerned may be entitled to an appropriate share out of the collection in the Central kitty out of the additional excise duties.

15. In the light of what is stated above, the challenge to the impugned notification fails and the petition is to that extent dismissed. This would not however, prevent the petitioners from assailing the orders of re-assessment on merits in appropriate appeals as we consider it unnecessary to examine the validity of the re-assessment orders in view of the equally efficacious alternative remedy available to them.

16. In the result, these writ petitions fail and are hereby dismissed with liberty to the petitioners to assail the impugned re-assessment orders by way of an appeal before the appropriate appellate authority, if so advised.

17. No costs.

T.S. THAKUR, J

B.N. CHATURVEDI, J

January 17,2006
ss